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No. 80-617

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

Elaine Jean Stemple, et. al.,

Petitioner

v.

Board of Education of Prince George's County, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Donald N. Bersoff
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301/ 528-5619

Attorney for Petitioner

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QUESTION PRESENTED

Where 20 U.S.C. § 1415(e)(3) of the Education for All Handicapped Children Act bars only those changes in educational placement made during the pendency of proceedings under the statute, does appellate court's construction of that provision requiring that the status quo be maintained as soon as school authorities identify, evaluate, or place handicapped children deny such children and their parents substantive and procedural rights otherwise guaranteed by the Act?

TABLE OF PARTIES

Petitioner

Elaine Jean Stemple, by her father and next friend, Rosswell C. Stemple.

Respondents

Prince George's County

Board of Education of Prince George's County

Norman H. Saunders
A. James Golato
Lesley Kreimer
Sue V. Mills
Maureen K. Steinecke
Chester E. Whiting
Susan B. Bieniasz
Jo Ann T. Bell
Bonnie F. Johns
Christine A. Dant,

Individually and as members of the Board of Education of Prince George's County.

State of Maryland

State Board of Education of the State of Maryland,

Richard Schifter
William Sykes
Mary Elizabeth Ellis
William M. Goldborough
Joanna T. Goldsmith
Albertine Thomas Lancaster
Lawrence A. Miller
Charles E. Thompson
G. George Ashke,

Individually and as members of the State Board of Education of the State of Maryland.

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JURISDICTION

The judgment of the Court of Appeals was rendered on May 27, 1980. On June 10, 1980 the Petitioner requested that the court rehear the case en banc. The court amended its decision to correct a factual error but denied the petition for rehearing on August 18, 1980. See Appendix B, pp. 25a-27a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves § 615(e)(3) of the Education for all Handicapped Children Act of 1975, 20 U.S.C. § 1415(e)(3) (1976) [hereinafter EAHCA]. [redacted] The specific provision at issue states:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.
>
> 20 U.S.C. § 1415(e)(3).

The implementing regulation promulgated by the Department of Health, Education, and Welfare, Bureau of Education for the Handicapped (now Office of Special

Education and Rehabilitative Services of the Department of Education [OSERS, ED) states:

> During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.
>
> 45 C.F.R. § 121a.513(a) (1978).

STATEMENT OF THE CASE

This case began over four years ago on June 18, 1976, when Elaine Stemple [hereinafter Petitioner or Elaine], by her father Rosswell Stemple, asked the Prince George's County Board of Education [hereinafter Respondent] for tuition reimbursement for expenses incurred as a result of Elaine's placement at a private school because her parents believed that the Respondent did not offer their daughter an appropriate education.

Petitioner is an multihandicapped adolescent girl with a long history of physical and emotional disabilities. By the time Elaine began first grade Respondent and her parents had recognized that she needed special educational training. She had intermittent hearing loss, poor gross and fine muscle

coordination, inarticulate speech, and emotional problems, all of which affected her scholastic functioning. As a result, she received reading and speech therapy and individualized teaching throughout most of her school years.

Petitioner attended Respondent's Suitland Elementary school from the first through third grades. At Suitland, it was determined that she needed special education placement and was placed in similar programs when she was transferred to Brooks Elementary School for one year and then transferred to William Bean Elementary School the next year. In January 1976, while Elaine was attending William Bean, Respondent removed her from the small self-contained special program and placed her in a pool of thirty children as part of an open space regular classroom with three other

classes of the same size. In other words, she was placed in a large room consisting of four classes with a total of 120 children. In addition, she received some remedial help.

By May 1976, Elaine's parents concluded that she was not progressing scholastically or emotionally and that the "mainstreaming" experiment that the school had imposed was a failure. This lack of progress was a continuation of educational problems that had been noted for three years, e.g., by the time she was in the sixth grade and eleven years old, she was reading on the second grade level despite the fact that the school considered her to be of average intelligence. The parents communicated their concerns to Respondent about their daughter's absence of educational development during the entire period. It

was only then, after several years of good faith and trust in the public school, that the Petitioner's parents removed her from the Respondent's school system in May 1976 and placed her in the Leary School, a private nonresidential school for handicapped children. Petitioner remained at Leary throughout that summer and the following two school years, 1976-1977 and 1977-1978.

At Leary, Elaine received intensive individualized training and showed great improvement in her reading, writing, and speech skills. She improved in other academic areas as well. It was evident that the self-contained small class program established for her was successful. Nevertheless, in September, 1978, her parents withdrew her from the Leary School because of financial hardships created by tuition payments.

Petitioner presently attends the Respondent's schools. Her parents agreed to placement after lengthy but cooperative negotiations with Respondent that resulted in an appropriate, mutually satisfactory program for Elaine.

Elaine's father's request for tuition reimbursement on June 1976 was denied. He petitioned, in timely fashion, for a formal hearing to adjudicate the claim that Respondent had established an inappropriate educational program as a result of its inadequate assessment of Elaine's handicapping tions. On August 1977 the local hearing officer ruled against her. See Appendix E, pp. 58a-67a. Petitioner then appealed to the Maryland State Department of Education Hearing Review Board [hereinafter the Board]. By this time, the

request for review covered May 1976 to August 1978. The Board, on February 23, 1978, affirmed the local hearing officer's decision. See Appendix D, pp. 51a-57a. It determined that Petitioner, not Respondent, had the burden of proving the inadequacy of her placement and that she did not meet the burden. Petitioner filed a request for judicial review with the federal court in the District of Maryland pursuant to 20 U.S.C. § 1415(e)(2)(4) and 29 U.S.C. § 794 (§504 of the Rehabilitation Act of 1973) and implementing regulation 45 C.F.R. § 84.36.

In Petitioner's complaint she asked the district court for a substantive review of the findings of the Board and to rule on two procedural matters--the allocation of burden of proof in special educations hearings to parents and the

introduction of evidence by the Maryland State Department of Education [hereinafter the State] at the Board hearing in violation of 45 C.F.R. § 121a.508(3). In response, both Respondent and the State, moved to dismiss the action.

The district court granted the motion to dismiss, ruling that:

1. 20 U.S.C. § 1415 was not applicable since it did not become effective until October 1, 1977 and the administrative proceedings challenging the Respondent's conduct began prior to that date, thus providing no basis for granting substantive review.

2. Allocation of the persuasion burden was properly on parents as 29 U.S.C. § 794 does not afford parents the right to place that burden on school officials and that allocation to parents was not a

violation of due process.

3. There was no need to reach the merits of procedural irregularity concerning the introduction of evidence at the State Board proceeding as any claim against the State would ultimately result in the award of retroactive money damages from the State to Petitioner and thus was barred by the eleventh amendment to the U. S. Constitution.

Petitioner appealed what she considered to be three clearly erroneous rulings to the fourth circuit.[1] On May

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[1] In her brief to the fourth circuit, Petitioner argued that:

a. EAHCA was applicable to this case as the request for judicial review occurred after the effective date of its jurisdictional provision and that even if it should be decided that there would have been retroactive application, the district court failed to apply the test for retroactivity under Bradley v. Sch. Bd. of City of Richmond, 416 U.S. 696 (1974).

27, 1980, the court of appeals affirmed the district court's dismissal of the case but did not reach any of Petitioner's contentions. Rather, it decided the case on grounds that were never at issue in the case on appeal nor in the district court. The appeals panel held that under the language of 20 U.S.C. § 1415(e)(3), Elaine had no right to reimbursement in any event. It construed that provision, which requires parents to keep their handicapped children in their then current educational placement

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[1] b. The persuasion burden, under both the United States and Maryland Constitutions properly belongs on the school system, as is practice in other States.

c. Her claims should not have been barred by the eleventh amendment as they were against the county, not the State, school system and counties enjoy no sovereign immunity either under state law or Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

during the pendency of administrative and judicial proceedings, so as to create a duty on the part of parents to maintain the status quo as soon as school authorities make a decision as to identification, evaluation, and placement of a handicapped child. Further, the appellate court held that the obligation continues until a decision not to contest is reached or, if a contest ensues, until that contest is finally determined. In her request for a rehearing en banc Petitioner asserted that the fourth circuit's interpretation was based on the application of incorrect legal principles and a misapprehension of material facts that were so fundamental as to create substantial and manifest injustice to the rights of handicapped children and their parents. On August 18, 1980, the court denied the

request for rehearing. It is from the original holding that Petitioner requests review.

REASON FOR GRANTING THE WRIT OF CERTIORARI

The fourth circuit court of appeals has, in this case, decided a new important question of federal law never before considered by the Supreme Court. In fact, this Court has never been asked to construe any provision of the EACHA, 20 U.S.C. §§ 1401-1461. The decision below is not only completely contrary to the plain meaning of 20 U.S.C. § 1415(e)(3), and to the intent of Congress, but also to interpretations of that section by four federal district courts in the second, fifth, eighth and District of Columbia circuits as well as interpretations by the administrative agency delegated the responsibility by

Congress for implementing the EAHCA. Of paramount importance is the fact that the lower court has decided the question in such a way as to effectively abrogate the substantive and procedural rights of a great number of handicapped children that Congress otherwise granted in the law in question.

The EAHCA is a remedial statute of national application in which Congress gave full recognition to the right of more than eight million handicapped children to an education appropriate for their unique needs. In Congress' view, the special education needs of handicapped children were not being met despite the fact that instructional techniques were advancing to the point that they could be met. It also found that state and local educational agencies have a responsibility to

provide for the educational needs of handicapped children but that inadequate financial resources prevented full realization of this responsibility. Congress concluded, therefore, that it was in the national interest for the federal government to assure that educational needs of handicapped children would be met by providing monetary assistance to state and local agencies. See 20 U.S.C.A. § 1401, Historical Note; Pub. L. 94-142 § 3 (1975).

Essentially, then, Congress' purpose in passing the EACHA was to:

> assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist

> States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children. Pub. L. 94-142 § 3(c).

As the appellate court recognized, the EAHCA's major purpose is to maximize the education of handicapped children. Stemple v. Bd. of Educ. of Prince George's County, 623 F.2d 893, 896 (4th Cir. 1980). The state's primary benefit from participation is financial assistance to help them achieve Congress' intent. Monahan v. State of Nebraska, 491 F. Supp. 1074, 1080 (D. Neb. 1980), appeal docketed, No. 80-1436 (8th Cir. June 4, 1980). Congress evidenced its strong commitment to the goal of the Act by increasing its financial appropriation to the states each year. The federal appropriation for FY 1977 was

$315 million, for FY 1978 $465 million,[2] for FY 1979 $804 million, and for FY 1980 $874.5 million. In FY 1981, Congress will appropriate approximately $922 million.[3]

The states' receipt of these funds is contingent on the submission of annual program plans which reflect the obligation of state and local education agencies to fulfill the purposes of the Act. 20 U.S.C. §§ 1412, 1413. Once states receive federal financial assistance under the EAHCA (and all do with the exception of New Mexico), they promise parents and their handicapped children access to a number of rights. Primary among these are the right to a free, appropriate education, parental

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[2] DHEW, Progress Toward a Free Appropriate Public Education 109 (1979).

[3] ED, Congressional Budget Justification 149 (1980).

participation in the writing of individual education plans designed to meet the unique needs of each handicapped child, and the right of each child to be properly and comprehensively evaluated by a multidisciplinary diagnostic team.

To insure that these, and other rights, are actually granted, the statute and their implementing regulations, see 45 C.F.R. § 121a.1-.754 (1978), contain a series of provisions which created procedural mechanisms for challenging the failure of school systems to properly identify, evaluate, place, or provide free appropriate education to handicapped children. '20 U.S.C. § 1415(b)(1)(E); 45 C.F.R. §§ 121a.504(a), 121a.506(a); Monahan v. State of Nebraska, 491 F. Supp. 1074, 1085 (D. Neb. 1980). ("One of the Act's goals in providing procedural safeguards

is to insure that a child is not placed in an inappropriate educational placement. . ."). These procedural safeguards include the right of parents to:

1. Examine their children's education records. 20 U.S.C. §1415(b)(1)(A); 45 C.F.R. § 121a.502.

2. Obtain an independent educational evaluation. 20 U.S.C. § 1415(b)(1)(A); 45 C.F.R. § 121a.503.

3. Consent to preplacement psycho-educational evalutions and to initial placement in special education programs. 20 U.S.C. § 1415(b)(1)(C)(D); 45 C.F.R. § 121a.504.

4. An impartial hearing during which parents and the school system may present oral and written evidence, confront and cross-examine witnesses, be represented by counsel, and obtain a written decision

from the hearing officer. 20 U.S.C. § 1415(d); 45 C.F.R. § 121a.509.

5. Appeal for review of the local hearing officer's decision by the state education agency. 20 U.S.C. § 1415(c)(d); 45 C.F.R. § 121a.509.

6. Judicial review in either federal or state court. 20 U.S.C. § 1415(e)(2); 45 C.F.R. § 121a.511.

All of these substantive and procedural rights granted by Congress are essentially extinguished in the case of the Petitioner and all those similarly situated given the appellate court's construction of 20 U.S.C. §1415(e)(3). Petitioner believes that this construction, therefore, presents an important and substantial federal question about which there is conflict between the fourth circuit and the federal district courts in four other

circuits. Left standing, the decision creates a rule that is directly inimical to Congress' purpose in enacting the EAHCA to the detriment of the civil rights of significant numbers of handicapped children and their parents. In support of this contention we make two assertions:[4]

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[4] In her petition for rehearing, Petitioner also argued that the fourth circuit's opinion, as applied in her case, was a fundamental denial of due process. While a subsidiary issue in this petition for a writ of certiorari the contention is worth discussing briefly.

The fourth circuit's decision severely undermined the basic due process principle of notice. E.g., Vitek v. Jones, 100 S.Ct. 1254, 1264-1265 (1980). Under Maryland rules in force at the time, the local school system was required to notify parents of any actions it proposed to take with respect to their handicapped children, to state the basis for these proposals, to inform parents of their right to be heard concerning the contemplated action, and to describe the procedure for requesting such a hearing "including an explanation that such a hearing may be requested at any time

I. .The court's opinion violates the plain meaning of 20 U.S.C. § 1415(e)(3).

II. The court's opinion violates the intent and express purpose of the EAHCA.

We discuss each of these points in turn.

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4 prior to the end of the school year. . . ." Md. Bylaw 13.04.01.21.(B)(3)(d) (1975) (emphasis added). There is no argument that Petitioner's parents complied with this provision. Their only duty was to file a request for a hearing to contest the school's action prior to the end of the school year 1976. This they did and in doing so dutifully followed bylaws duly promulgated by the Maryland State Department of Education. For an appellate court to create a new duty, unsupported by the text of the EACHA was to violate the very essence of the due process clause of the fourteenth amendment. The fourth circuit has, in effect, fabricated an ex post facto rule in 1980 precluding the vindication of substantive and procedural rights to which Plaintiff was clearly entitled under a valid and existing law in 1976.

I. THE COURT'S OPINION VIOLATES THE PLAIN MEANING OF 20 U.S.C. § 1415(e)(3).

Although opting for a literal interpretation of the section in question, Stemple v. Bd. of Educ. of Prince George's County, 623 F.2d 893, 897 (1980), the appellate court created a "duty to preserve the status quo," id. at 898, out of whole cloth that is not only contrary to the plain meaning of 20 U.S.C. § 1415(e)(3), but to all prior cases involving tuition reimbursement and to interpretations by the administrative agency delegated the responsibility for implementing and enforcing the EACHA.

Under the Act the obligation to preserve the status quo is triggered only "during the pendency of any proceedings conducted pursuant to this section. . . ." 20 U.S.C. § 1415(e)(3). The "proceedings" referred to are limited to

those specified--impartial due process hearings conducted by the local education agency, appeal and review by the state educational agency, and civil action in any appropriate state or federal district court. 20 U.S.C. § 1415(b)(2), (c), (d), (e)(1)(2). An administrative or judicial proceeding commences only when a parent files a complaint challenging identification, evaluation, placement, or the provision of a free appropriate education.[5] Until that time the school is deemed only to have proposed (or refused to initiate) a change in one or more of these four areas, classified under the Act as

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[5] In accord is 45 C.F.R. § 84.36, an implementing regulation, 29 U.S.C. § 794, which incorporates the procedural safeguards under the EAHCA. Under that provision, procedural safeguards are defined as notice, opportunity to examine records, an impartial hearing, and a review process.

"matters," not proceedings. 45 C.F.R. § 121a.506(a); see also 121a.504(a)(1), (2); Monahan v. State of Nebraska, 491 F. Supp. 1074, 1089, 1090 (D. Neb. 1980); see Stuart v. Nappi, 443 F. Supp. 1235, 1241 (D. Conn. 1978).

Thus, as in this case, the Respondent's removal of the Petitioner from a small special education program to an open space classroom, despite the fact that she was multiply handicapped, was a "matter," about which the parents had the right to complain within the context of an impartial hearing. It was not a proceeding either as reflected in 20 U.S.C. § 1415 or under applicable regulations, i.e., 45 C.F.R. §§ 121a.506-121a.511. Maryland law defines a proceeding as one in which there is the conduct of "juridical business before a court or judicial officer. . . ."

Estep v. State, 14 Md.App. 53, 64, 286 A.2d 187, 193 (1972); see Erwin v. United States, 37 F. 470, 488 (S.D. Ga. 1889). In like manner, an administrative proceeding would be one before a duly appointed hearing officer or administrative law judge.

If Congress had intended to impose a restriction comparable to the one created by the fourth circuit one assumes that it would have done so explicitly, in a manner exemplified by the New York legislature. In its statute concerning appeals procedures when handicapped children contest school districts' proposals, New York has decreed:

> During the pendency of any proceedings conducted pursuant to this section and during the initial identification, evaluation, and placement procedure pursuant to this section and during the initial identification, evaluation and placement procedure pursuant to Section Forty-four hundred

> two of this article, unless the commissioner [of education for New York] or local school district and the parents or legal guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . . (emphasis added).
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> N.Y. Educ. Law § 4404.4 (McKinney 1978).

Further, the EAHCA clearly contemplates that procedural safeguards will be afforded parents who place their children in private schools and request reimbursement. An implementing regulation to the Act concerning private schools entitled "Placement of Children by Parents" states: "Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 121a.500-121a.514. . . ." 45

C.F.R. § 121a.403(b). This regulation does not limit access to impartial hearings only to those cases in which parents, to the perceived detriment of their child, maintain that child in an inappropriate public school program for what may be a term of years while they exhaust all their administrative and judicial remedies.[6]

Decisions in federal courts in the District of Columbia, New York, Texas, and Nebraska unequivocally indicate that tuition reimbursement is a proper remedy under the EAHCA even though parents withdraw their handicapped children prior to the initiation of hearings under 20 U.S.C. § 1415. Capello v. D.C. Bd. of Educ., No. 79-1006 (D.

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[6] Maryland law also recognizes that reimbursement, as well as payment, may be necessary. Md. Educ. Code Ann. § 8-409(c).

D.C., decided Jan. 23, 1980), reported at 3 EHLR 551:500[7] (D. D.C. January 23, 1980) appeal dismissed (D.C. Cir., June 11, 1980); Frankel v. Comm'r. of Educ., 480 F. Supp. 1156, 1160 (S.D. N.Y. 1979); Howard S. v. Friendswood Ind. Sch. Dist., 454 F. Supp. 634 (S.D. Tex. 1978); Monahan v. State of Nebraska, 491 F.Supp. 1074 (D. Neb. 1980).

In Capello, parents of a mentally retarded and emotionally disturbed youth sought tuition reimbursement for their child's education in a private out-of-state residential facility from the local board of education. Shortly after they filed the action in federal district court under the EAHCA and § 504 but before the court heard the case, the

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[7] The case has not yet been reported in the federal supplement. The citation here is to the Education of the Handicapped Law Report, a looseleaf service published by CRR Publishing Co., Wash., D.C. 20005.

parents removed their son from the District of Columbia public schools and placed him in the residential facility. The court found that the private facility was an appropriate program for the child and that the public school's plan did not provide commensurate opportunities. Basing its decision on both the EAHCA and § 504, the court held in January, 1980 that school systems "are obliged to provide [Petitioner] a free and appropriate individualized education (citations omitted)." When a residential placement is necessary to afford such an education it must be provided at no cost to the parents (citations omitted)." It then ordered the local education agency to assume financial responsibility for the maintenance and placement of the handicapped children retroactive to May, 1979, the

date on which it originally denied the parents request for a preliminary injunction. Thus, despite the fact that the child was removed during the pendency of the proceedings, the court found no barrier to granting the requested relief for tuition reimbursement.

In New York, parents of an emotionally disturbed child removed their son from a public high school when his behavior deteriorated in an inadequate program. They placed him in a private out-of-state-school at their own expense. Subsequently, they petitioned the proper local school system committee for reimbursement who denied the request. The parents then sought a hearing before an impartial official who recommended that the school district provide reimbursement. But the committee told the district's board of

education to deny payment. The board accept the recommendation and the parents appealed the decision to the New York State Commissioner of Education who dismissed the case. The Commissioner denied a petition to reopen the matter. The parents then filed an action in federal district court under 20 U.S.C. §§ 1401-1461. In response, state and local school officials moved to dismiss, claiming, in part, that no relief could be granted as the parents had failed to obtain prior approval of the Commissioner for nonpublic school placement. The defendants were urging, the court perceived, that the parents had no choice other than to accept the decision of the Commissioner or to provide a suitable educational alternative at their own expense. That position was held to be antagonistic to the intent of

the EACHA. "In effect, this interpretation renders the Commissioner's decision final and unreviewable. . . and deprives the defendants (sic)[8] of the rights protected by the Education for All Handicapped Children Act. . . namely, the proper and timely identification and placement of handicapped children and assurance of procedural safeguards in the provision of such services." Frankel v. Comm'r of Educ., 480 F. Supp. 1156, 1160 (S.D. N.Y. 1979).

In Howard S., a multiply impaired high school student was placed by his parents in a private school for handicapped children in Texas after he made a suicide attempt, partly as a consequence of misplacement in the school system's program. The district

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[8] In the context of the decision and in light of the fact that the court refused to grant the motion to dismiss, the court could only have meant the plaintiff parents.

disclaimed any responsibility for his special education claiming that his entrance into a hospital for treatment of wounds suffered in his suicide attempt meant that he was no longer enrolled in their system. In addition, they failed to provide a hearing to consider the parents' claim that the school did not provide an appropriate program. The court ordered, among other relief, that the school district's pay the full cost of tuition in the nonpublic facility until it provided all safeguards under the EAHCA and § 504. Howard S. v. Friendswood Ind. Sch. Dist., 454 F. Supp. 634 (S.D. Tex. 1978).

In the most recent and explicit exposition of 20 U.S.C. § 1415(e)(3), a district court in Nebraska interpreted that section precisely in the manner that Petitioner contends it should be and in

stark contrast to the fourth circuit's construction. In a case involving tuition reimbursement for two children with multiple handicaps the court held that the terms "the then current educational placement" in § 1415(e)(3) is to be determined at the time a parent submits a complaint to the local school district "since such a complaint would be the beginning of an administrative proceeding provided by the Act [EACHA]." Monahan v. State of Nebraska, 491 F. Supp. 1074, 1089 (D. Neb. 1980).

The appellate court's decision is also at odds with policy developed by the Bureau of Education for the Handicapped (BEH), the federal agency delegated the responsibility for monitoring the implementation of the EAHCA. In two policy letters interpreting local school system duties under the Act, the agency

has indicated that it considers 20 U.S.C. § 1415(a)(3) to pertain solely to formal administrative and judicial proceedings and not to any prior actions by school officials. In one letter, BEH indicated that a system's interpretation that a child's present placement is "that which the LEA declares it to be" was clearly wrong. The pendency of the proceeding provision applied only, it said, to hearings and appeals under 45 C.F.R. §§ 121a.504, 121a.510-121a.511. 2 EHLR 211:95, 97 (1979). In a subsequent letter BEH again indicated that the pendency provision was meant to encompass only "administrative as well as judicial proceedings." 2 EHLR 211:145, 146 (1980). See Appendix F, pp. 68a-93a for reproduction of these letters.

II. THE COURT'S OPINION VIOLATES THE INTENT AND EXPRESS PURPOSE OF THE EAHCA.

Plaintiff does not quarrel with the fourth circuit's conclusion that, absent an agreement between parents and the school system, the challenged section requires parents to keep children in their current educational assignment during the pendency of hearing and review procedures. What Plaintiff believes is manifest error is the court's conclusion that this "duty . . . arises as soon as school authorities make a decision as to identification, evaluation and placement of a handicapped child. . . ." Stemple v. Bd. of Educ. of Prince George's County, 623 F.2d 893, 898 (4th Cir. 1980). The burden of the court's rationale is that parents have a "duty to preserve the status quo," id., and that this duty would be compromised if parents

unilaterally removed their children from public school programs any time after they were informed of the agency's proposed actions. That this interpretation is contrary to the express purpose and intent not only of the contested provision but to the entire Act and will serve to deny many children their rights under the EACHA to their irreparable harm may be exemplified in the following hypothetical, but not unrealistic, situation.

Suppose parents of a severely handicapped child wish full-time special education in a self-contained special class with a small pupil-teacher ratio. Their child is presently in a regular class with 30 children receiving little or no special help. The school refuses to comply with the parents' request, asserting that the current program is

appropriate. The parents believe, given their child's significant handicaps, that the school's denial of their request creates an intolerable and damaging situation. The parents earn slightly below the average income of three-person families. Under the court's ruling in Stemple and because they cannot afford tuition in a private school without reimbursement, they have no recourse but to keep their child in the public school program. They now invoke the procedural safeguards provisions of 20 U.S.C. § 1415. After exercising their right to be heard at the local education agency (LEA) level, the hearing officer renders a decision (within the 45 days required by 45 C.F.R. § 121a.512) in which the school system's program is deemed inadequate. Because the system has no appropriate program available, the hearing officer

orders nonpublic school placement at public expense. The school system decides to appeal to the state education agency for review. The parents request that the LEA place their child in a small special class during the pendency of this proceeding but it refuses to do so. Because there has been no mutual agreement to change, under 20 U.S.C. §1415(a)(3) and 45 C.F.R. § 121a.513 the parents must keep their child in the regular class although the hearing officer determined that such a program violated the EAHCA. On review, the state hearing official affirms the decision below (within the 30 days allotted 45 C.F.R. § 121a.512(b)). The school then exercises its right to judicial review in federal district court under 20 U.S.C. § 1415(e)(2) and 45 C.F.R. § 121a.511. The court schedules a hearing on this

matter in six months having rejected a motion for expedited review.[9] The trial judge renders a decision in three months, ruling in favor of the school system but on a procedural issue. It does not reach the merits and dismisses the parent's claim. The parents now request reversal of the lower court's decision in the court of appeals. Because the appellate tribunal's docket is crowded with criminal cases, oral argument is not scheduled for five months after the parties have filed their briefs, a process which in itself consumes almost three months. One year after oral argument the court of appeals reverses the lower court and remands the case for a hearing on the substantive issues.

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[9] Scheduling and timelines for a decision are solely within the discretion of this and all other courts as neither the Act nor the regulations contain time constraints upon the judiciary.

However, the LEA petitions the Supreme Court to contest the appellate court's decision and the Court grants certiorari. The Supreme Court upholds the circuit court one and one-half years later. With the procedural wrangle out of the way the district court finally hears the substantive issues. Four months after doing so, it affirms the decision of the state hearing officer, agreeing that nonpublic school placement is the appropriate program for the child.

All of the due process safeguards available to the parties have been exhausted, the "contest is finally determined," id. at 898, and the parents are now entitled to private school placement at public expense. During the pendency of these proceedings, which have consumed four and one-half years, the child has been maintained in a

program that all who have heard the substance of the case have agreed was entirely inappropriate. Unequivocally, that was not the intent of Congress when it enacted the EAHCA nor the Department of Health, Education, and Welfare when it published its regulations implementing the Act. As the fourth circuit recognized, 20 U.S.C. §§ 1401-1461 is a comprehensive statute designed to secure the fullest possible benefits to handicapped children and their families. Id. at 896 citing S. Rep. 94-168, 94th Cong. 1st Sess., U.S. Cong. and Admin. News 1425, 1430 (1975). But that court's interpretation of one small subsection of the Act serves to mitigate, if not destroy, the law's entire intent as reflected in its purpose provisions. See 20 U.S.C. §1401; cf. Monahan v. State of Nebraska, 491 F. Supp. 1074, (D. Neb.

1980) (state-imposed statute of limitations to file complaint in federal court under 20 U.S.C. § 1415(e) undermines federal policy embodied in EAHCA). The right of parents to withdraw their handicapped children from an inappropriate program prior to the initiation of legal proceedings would, on the other hand, serve those purposes.

Under the appellate court's opinion, parents may be punished for their patience and schools' rewarded for their intransigence. As soon as the public agency proposes some action with regard to identification, evaluation, or placement, the parents are locked into the school system and may not be able to escape for several years, i.e., until all legal proceedings have been concluded. Parents who seek to negotiate with the school system and place their trust, at

least initially, in the system's decision should not have to endanger their handicapped children's education.

The fourth circuit, in its opinion, relied very heavily on the principle of preservation of the status quo and reliance on the preliminary injunction as an example of the legal system's concern for maintaining the position of the parties as of the initiation of litigation. But, in doing so the court failed to explain the purpose of preserving the status quo, i.e., to prevent irreparable harm to all parties. Its opinion may serve the goal of maintaining the current status of the litigants but the cost is perpetuation, not prevention, of harm. See P. v. Riles, 343 F.Supp. 1306, 1308 (N.D. Cal. 1972) aff'd 502 F.2d 963 (9th Cir. 1974).

A proper interpretation of 20 U.S.C. § 1415(e)(3), limiting it to its plain meaning, i.e., that while administrative of judicial proceedings are pending children must remain in their current educational placement, would do nothing to harm the public education agency, and would only serve to effectuate the purpose of the EAHCA. Parents who withdraw their children prior to the pendency of proceedings are not automatically assured that they will receive private schooling at public expense. They still bear the risk of a decision by the hearing officer that the local school system was, indeed, able to provide an appropriate program. But, if parents ultimately win, they are only being afforded remedies to which they were entitled under the law, i.e., the right to a free appropriate education for

their handicapped children. However, under the lower court's interpretation, no matter how inappropriate the school's program, parents may not recover should they remove their children from that program to a private appropriate one in the face of the school's hostility, bad judgment or unyieldingness. No court should interpret a statute to protect a wrongful party who has violated that statute. Yet, that is the consequence of the fourth circuit's decision.

Parents are now forced to abide by the school system's proposals, even when they believe them to be totally inadequate, and are precluded from withdrawing their child from the time the school makes its placement proposals until their challenge to those proposals "is finally determined." Id. at 898. The EAHCA was not meant to force parents

to choose between an improper education for their children and the expenditure, with no possibility of recovery, of significant amounts of money to secure an appropriate education. While wealthy parents may be in the position to opt for private placement at their own expense, the appellate court's decision relegates poor parents to an intolerable Hobson's choice. Insofar as its ruling would affect members of the poorest classes of our society in an invidious way it becomes an unconstitutional denial of equal protection. San Antonio Ind. Sch. Dist. v. Rodriquez, 411 U.S. 1, 26 (1973); Griffin v. Illinois, 351 U.S. 12, 16-18 (1956).

CONCLUSION

The "duty" of parents to preserve the status quo once the school system has proposed to identify, evaluate, or place

a handicapped child was created by the fourth circuit in a vacuum. It has no support in the statute's legislative history, the plain words of the EAHCA, all other decisions interpreting the provision in question, or from the administrative agency responsible for its enforcement and funding. In contrast, as Petitioner has shown, there is a substantial body of statutory and decisional support as well as federal policy, which argues against the creation of this duty. In essence, the fourth circuit's decision stands as an anomaly.

Should this Court decide not to grant this Petition, the appellate court's opinion will go uncorrected for an inordinately long time, creating substantial and unwarranted damage. A failure to resolve this significant

federal question will perpetuate a situation in which a remedial statute of national application is administered and applied unevenly in many school districts throughout the United States. Given the competing decisions in Stemple and Capello, for example, whether handicapped children have access to the substantive and procedural rights under the EAHCA under facts such as these cases represent, depends entirely on what side of the District of Columbia boundary line those children live. Handicapped children in the fourth circuit should not have to suffer the loss of federal rights for the foreseeable future while their counterparts in other jurisdictions enjoy theirs. Moreover, the decision works to the severe detriment of handicapped children without any correlative legitimate benefit to school

systems.

Finally, the decision below leaves as guiding precedent in the federal court of the District of Maryland an unfortunate and legally indefensible decision which has the consequence of barring access to judicial review, of placing the persuasion burden on parents in all instances, and especially harmful to future litigants, of erecting an absolute bar to tuition reimbursement under an erroneous analysis of the eleventh amendment's application to the EAHCA and § 504.

Thus, Petitioner respectfully asks this Court to grant its petition for a writ of certiorari so this matter may be considered properly.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petition for Writ of Certiorari was mailed, postage prepaid, this 17th day of October, 1980 to: Paul Nussbaum and Richard Daniels, Attorney for the Board of Education of Prince George's County and other Defendants named herein, 3723 4th Street, Mt. Rainier, Maryland 20822; and Ellen Heller, Assistant Attorney General and Attorney for the State Board of Education of the State of Maryland and its members, One S. Calvert Street, Baltimore, Maryland 21202.

Donald N. Bersoff